ordinary arbitration, and recommended that it be adopted. The proposition is made that this prize court, the constitution of which is all agreed to, shall have vested in it general jurisdiction to sit a court in the hearing and determination of general questions, or that another court be organized in the same way. It is quite apparent that it is receiving favorable consideration, and we may have the highest hope of its practical fruition.

ADDRESS OF HON. ELIHU ROOT, PRESIDENT OF THE SOCIETY,

ON

The Basis of Protection to Citizens Residing Abroad

I shall ask you to listen for a few minutes to some remarks regarding the protection which a nation should extend over its citizens in foreign countries. I do not select this topic because I have anything new to say about it, or because there is any real controversy among international lawyers concerning the principles involved or concerning the fundamental rules to be applied, but because there is a considerable degree of public misunderstanding about the subject, and situations are continually arising in which a failure of the public in one country or another to justly appreciate the extent and nature of international obligation leads to resentment and unfriendly feeling that ought to be avoided.

The subject has grown in importance very rapidly during recent years. The world policy of commercial exclusiveness prevailing in the early part of the last century has practically disappeared. The political relations on the one hand and the commercial and industrial relations on the other hand of different parts of the earth to each other are quite separate and distinct. It is not uncommon to find that a nation has commercial colonies which bear no political relation to her whatever, and political colonies which are industrially allied most closely to other countries.

The increase in facilities for transportation and communication — steamships and railroads and telegraphs and telephones — has set in motion vast armies of travelers who are making their way into the most remote corners of foreign countries to a degree never before known.

The general diffusion of intelligence among the people of all civilized, and to a considerable degree of semi-civilized, countries, has carried to the great mass of the people — the working people of the world — a knowledge of the affairs and the conditions of life in other lands; and this, with the cheapness and ease of transportation, has led to enormous emigration and shifting of population. One of the salient features of modern political development has been the severance of the people from the soil of their native countries. The peasant, who was formerly a fixture in his native valley, unable to conceive of himself as a part of any life beyond the circle of the surrounding hills, now moves freely to and fro, not only from one community to another, but from one country to another. Labor is becoming fluid, and, like money, flows towards the best market without paying much attention to political lines. The doctrine of inalienable allegiance so inconsistent with the natural course of development of the new world, and so long and so stoutly contested by the United States, has been almost universally abandoned. It is manifest that the few nations which have not given their assent to the right of their citizens to change their citizenship and allegiance as they change their residence will not long maintain their position. This change has led to a new class of citizens traveling or residing abroad; that is, the naturalized citizen, who, returning to his country of origin or going to still other countries, claims the protection not of his native but of his adopted government. Among the great throngs of emigrants to other countries may be distinguished two somewhat different classes — one composed of those who have transferred their substantial interests to the new country and are building up homes for themselves; the other class composed of those who still continue their principal interests in the country from which they have come and under their new conditions are engaged in accumulating means for the better support of the families and friends they have left behind them, or for their own future support after the return to which they look forward.

The great accumulation of capital in the money centers of the world, far in excess of the opportunities for home investment, has led to a great increase of international investment extending over

the entire surface of the earth, and these investments have naturally been followed by citizens from the investing countries prosecuting and caring for the enterprises in the other countries where their investments are made. For example, it was estimated three or four years ago that within the preceding ten years over seven hundred millions of capital had gone from the United States alone into Mexico for investment; and this capital had been followed by more than forty thousand citizens of the United States who had become resident in Mexico. This same process has been going on all over the world.

All these forms of peaceful interpenetration among the nations of the earth naturally contribute their instances of citizens justly or unjustly dissatisfied with the treatment they receive in foreign countries and calling upon their own governments for protection. In two directions the process has gone so far as to justify and receive limitation. On one hand, there has come to be a recognition of the essential difference between emigration *en masse,* by means of which the people of one country may virtually take possession of considerable portions of the territory of another country to the practical exclusion of its own citizens, and the ordinary travel and residence upon individual initiative to which the usual conventions relating to reciprocal rights of travel and residence relate. The occasion for considering this difference naturally depends very much upon the capacity of the emigrants for assimilation with the people of the country to which they go. The wider the differences in race, customs, traditions, and standards of living, the less is the probability of assimilation and the greater the certainty that emigration of large bodies of people will assume the character of peaceful invasion and occupation of territory. After many years of discussion China has come to recognize the existence of such a distinction in respect of Chinese emigration to North America. Japan has recognized it from the first, and there has never been any question between the Governments of Japan and the United States upon that subject.

On the other hand, the United States has itself put a limit upon the practice, which had already reached the point of serious abuse,

of permitting the natives of other countries to become naturalized here for the purpose of returning to their homes or seeking a residence in third countries with the benefit of American protection. Several years ago it was estimated that there were in Turkey seven or eight thousand natives of Turkey who had in one way and another secured naturalization in the United States and had gone home to live with the advantage over their friends and neighbors of being able to call upon the American embassy for assistance whenever they were not satisfied with the treatment they received from their own government. At the time of the troubles in Morocco, which were disposed of at the Algeciras Conference, an examination of the list of American citizens in Morocco showed that one-half of the list consisted of natives of Morocco who had been naturalized in the United States and had left this country and gone back to Morocco within three months after obtaining their naturalization papers. We have now adopted a rule, which has been embodied in a number of treaties and in the Act of Congress of March 2, 1907, for the purpose of checking this abuse. The new rule is, that when a naturalized citizen leaves this country instead of residing in it, two years' residence in the country of his origin or five years' residence in any other country creates a presumption of renunciation of the citizenship which he has acquired here, and unless that presumption is rebutted by showing some special and temporary reason for the change of residence, the obligation of protection by the United States is deemed to be ended.

I have dwelt upon the magnitude and diversity of the causes which are resulting in the presence in each civilized country of great numbers of citizens of other countries, because conditions so universal plainly must be dealt with pursuant to fixed, definite, certain, and universally recognized rules of international action.

The simplest form of protection is that exercised by strong countries whose citizens are found in parts of the earth under the jurisdiction of governments whose control is inadequate for the preservation of order. Under such circumstances in times of special disturbance it is an international custom for the countries having the power to intervene directly for the protection of their own citizens,

as in the case of the Boxer rebellior in China, when substantially all the Western powers were concerned in the march to Pekin and the forcible capture of that city for the protection of the legations. On a smaller scale, armed forces have often been landed from men-of-war for the protection of the life and property of their national citizens during revolutionary disturbances, as, for example, in Central America and the West Indies. Such a course is undoubtedly often necessary, but it is always an impeachment of the effective sovereignty of the government in whose territory the armed demonstration occurs, and it can be justified only by unquestionable facts which leave no practical doubt of the incapacity of the government of the country to perform its international duty of protection. It leads to many abuses, especially in the conduct of those nationals who, feeling that they are backed up by a navy, act as if they were superior to the laws of the country in which they are residing and permit their sense of immunity to betray them into arrogant and offensive disrespect.

Similar in principle to the method of direct protection which I have mentioned is the practice of exercising extraterritorial jurisdiction, under convention arrangements, in countries whose methods of administering justice are very greatly at variance with the methods to which the people of the great body of civilized states are accustomed, such, for example, as China and Turkey.

As between countries which maintain effective government for the maintenance of order within their territories, the protection of one country for its nationals in foreign territory can be exercised only by calling upon the government of the other country for the performance of its international duty, and the measure of one country's international obligation is the measure of the other country's right. The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens. In the famous Don Pacifico case, Lord Palmerston said, in the House of Commons:

> If our subjects abroad have complaints against individuals, or against the government of a foreign country, if the courts of law of that country can afford them redress, then, no doubt, to those courts of justice the British subject ought in the first instance to apply; and it is only on a denial of justice, or upon decisions manifestly unjust, that the British Government should be called upon to interfere. But there may be cases in which no confidence can be placed in the tribunals, those tribunals being, from their composition and nature, not of a character to inspire any hope of obtaining justice from them. It has been said: "We do not apply this rule to countries whose governments are arbitrary or despotic, because there the tribunals are under the control of the government, and justice can not be had; and, moreover, it is not meant to be applied to nominally constitutional governments, where the tribunals are corrupt."
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> I say, then, that our doctrine is, that, in the first instance, redress should be sought from the law courts of the country; but that in cases where redress can not be so had — and those cases are many — to confine a British subject to that remedy only, would be to deprive him of the protection which he is entitled to receive. * * *
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> We shall be told, perhaps, as we have already been told, that if the people of the country are liable to have heavy stones placed upon their breasts, and police officers to dance upon them; if they are liable to have their heads tied to their knees, and to be left for hours in that state; or to be swung like a pendulum, and to be bastinadoed as they swing, foreigners have no right to be better treated than the natives, and have no business to complain if the same things are practiced upon them. We may be told this, but that is not my opinion, nor do I believe it is the opinion of any reasonable man.

Nations to which such observations apply must be content to stand in an intermediate position between those incapable of maintaining

order, and those which conform fully to the international standard. With this understanding there are no exceptions to the rule and no variations from it. There may be circumstances at particular times and places such that the application of the rule calls for action regarding foreign citizens quite unlike the action ordinarily taken for the benefit of native citizens, but it is always action which would be equally required in case a native citizen were placed under the same circumstances of exigency. It is plain that no other rule is practicable. Upon any other basis every country would be obliged to have two systems of law and administration and police regulations, and the existence of great numbers of foreigners in a country would be an intolerable burden. The standard to which the rule appeals is a standard of right, and not necessarily of actual performance. The foreigner is entitled to have the protection and redress which the citizen is entitled to have, and the fact that the citizen may not have insisted upon his rights, and may be content with lax administration which fails to secure them to him, furnishes no reason why the foreigner should not insist upon them and no excuse for denying them to him. It is a practical standard and has regard always to the possibilities of government under existing conditions. The rights of the foreigner vary as the rights of the citizen vary between ordinary and peaceful times and times of disturbance and tumult; between settled and ordinary communities and frontier regions and mining camps.

The diplomatic history of this country presents a long and painful series of outrages on foreigners by mob violence. These have uniformly been the subject of diplomatic claims and long-continued discussion, and ultimately of the payment of indemnity. An examination of these discussions will show that in every case the indemnity was in fact paid because the United States had not done in the particular case what it would have done for its own citizens if our laws had been administered as our citizens were entitled to have them administered. Of course, no government can guarantee all the inhabitants of its terrritory against injury inflicted by individual crime, and no government can guarantee the certain punishment of crime; but every citizen is entitled to have police protection

accorded to him commensurate with the exigency under which he may be placed. If he is able to give notice to the government of intended violence against him he is entitled to have due measures taken for its prevention, and he is entitled always to have such vigorous prosecution and punishment of those who are guilty of criminal violation of his rights that it will be apparent to all the world that he cannot be misused with impunity and that he will have the benefit of the deterrent effect of punishment.

It is a distressing fact that in one important respect the Government of the United States fails to comply with its international obligation in giving the same degree of protection and opportunity for redress of wrong to foreigners that it gives to its own citizens. The difficulties which beset aliens in a strange land are ordinarily local difficulties. The government and the people of the foreign country are usually quite ready, in a broad and abstract way, to accord to foreigners the fullest toleration, equality before the law, and protection. But the people of the particular community with whom the alien comes in contact too often fail of understanding and sympathy. They misunderstand and resent the foreign customs with which they are unfamiliar. They are aroused to anger by the competition to which the foreigner subjects them. Immediate contact is too apt at first to breed dislike and intolerance towards what Bret Harte describes as the "defective moral quality of being a foreigner." Our Constitution recognizes this natural and often inevitable prejudice by giving to our national courts jurisdiction over all civil suits between aliens and citizens of the United States. We fail to recognize the same conditions, however, in respect of the security of the persons and property of aliens. The Revised Statutes of the United States aim to protect citizens of the United States against local prejudice and injury by providing in section 5508:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or

privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

This provision, however, does not apply to aliens, and no similar provision applies to them. Accordingly, defenseless Chinamen were mobbed at Denver in 1880, and at Rock Springs, Wyoming, in 1885; Italians were lynched in New Orleans in 1891, and again at Rouse, Colorado, in 1895; and Mexicans were lynched at Yreka, California, in 1895; and Italians at Tallulah, Louisiana, in 1899, and again at Erwin, Mississippi, in 1901. Our Government was practically defenseless against claims for indemnity because of our failure to extend over these aliens the same protection that we extend over our own citizens, and the final result of long diplomatic correspondence in each case was the payment of indemnity for the real reason that we had not performed our international duty. In these discussions our State Department from time to time undertook to shelter itself behind the distribution of power in our constitutional system, and the fact that there was no law of the United States providing for any redress except at the hands of the State officials in the very locality where prejudice led to the injury. Yet when an American citizen was injured by a mob in Brazil in 1875, the dispatch of Secretary Fish to the American Minister at Rio said:

> You represent that the facts as set forth in the memorial of the claimant are admitted by that Government, which, however, denies its accountability and says that the province where the injury to Mr. Smyth took place is alone answerable. Supposing, however, the case to be a proper one for the interposition of this Government, the reference of the claimant to the authorities of the province for redress will not be acquiesced in. Those authorities can not be officially known to this Government. It is the Imperial Government at Rio de Janeiro only which is accountable to this Government for any injury to the person or property of a citizen of the United States committed by the authorities of a province. It is with that Government alone that we hold diplomatic intercourse. The same rule would be applicable to the case of a Brazilian subject who, in this country, might be wronged by the authorities of a State.

And President Harrison, in his message to Congress of December 9, 1891, relating to the lynching of Italians at New Orleans in that year, said:

> Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts. This has not, however, been done, and the federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights.

It is to be hoped that our Government will never again attempt to shelter itself from responsibility for the enforcement of its treaty obligations to protect foreigners by alleging its own failure to enact the laws necessary to the discharge of those obligations.

The most frequent occasions of appeal by citizens for protection in other countries arise upon the assertion that justice has been denied them in the courts, and this appears, unfortunately, to be a frequent occurrence. The justification of such complaints does not rest upon any obligation of another country to furnish any better or different judicial relief or procedure to foreigners than is provided for the citizens of the country itself, but it results from the fact that in many countries the courts are not independent; the judges are removable at will; they are not superior, as they ought to be, to local prejudices and passions, and their organization does not afford to the foreigner the same degree of impartiality which is accorded to citizens of the country, or which is required by the common standard of justice obtaining throughout the civilized world. When justice is denied for such reasons there is a failure on the part of the government to perform its international duty, and a right on the part of the government whose citizen has failed to secure justice to demand reparation.

A large proportion of such complaints are, however, without just foundation. Citizens abroad are too apt to complain that justice has been denied them whenever they are beaten in a litigation, forgetting that, as a rule, they would complain just the same if they were beaten in a litigation in the courts of their own country. When a man goes into a foreign country to reside or to trade he submits himself, his rights, and interests to the jurisdiction of the courts of that country. He will naturally be at a disadvantage in litigation against citizens of the country. He is less familiar than they with the laws, the ways of doing business, the habits of thought and action, the method of procedure, the local customs and prejudices, and often with the language in which the business is done and the proceedings carried on. It is not the duty of a foreign country in which such a litigant finds himself to make up to him for these disadvantages under which he labors. They are disadvantages inseparable from his prosecuting his business in a strange land. A large part of the dissatisfaction which aliens feel and express regarding their treatment by foreign tribunals results from these causes, which furnish no just ground for international complaint. It is very desirable that people who go into other countries shall realize that they are not entitled to have the laws and police regulations and methods of judicial procedure and customs of business made over to suit them, or to have any other or different treatment than that which is accorded to the citizens of the country into which they have gone; so long as the government of that country maintains, according to its own ideas and for the benefit of its own citizens, a system of law and administration which does not violate the common standard of justice that is a part of international law; and so long as, in conformity with that standard, the same rights, the same protection, and the same means of redress for wrong are given to them as are given to the citizens of the country where they are. On the other hand, every one who goes into a foreign country is bound to obey its laws, and if he disobeys them he is not entitled to be protected against punishment under those laws. It follows, also, that one in a foreign country must submit to the inconvenience of proceedings that may be brought in accordance with law upon any

bona fide charge that an offense has been committed, even though the charge may not be sustained. Nevertheless, no violation of law can deprive a citizen in a foreign country of the right to protection from the government of his own country. There can be no crime which leaves a man without legal rights. One is always entitled to insist that he shall not be punished except in accordance with law, or without such a hearing as the universally accepted principles of justice demand. If that right be denied to the most desperate criminal in a foreign country, his own government can and ought to protect him against the wrong.

Happily, the same causes which are making questions of alien protection so frequent are at the same time bringing about among all civilized peoples a better understanding of the rights and obligations created by the presence of the alien in a foreign country; a fuller acceptance of the common international standard of justice, and a gradual reduction of the local prejudices and misunderstandings which stand in the way of the alien's getting his full rights. Discussions between governments upon complaints of wrong to their citizens tend more and more to relate to questions of fact upon the determination of which accepted and settled rules can be readily applied. And in all nations the wisdom and sound policy of equal protection and impartial justice to the alien is steadily gaining acceptance in the remotest parts and throughout even the least instructed communities.

[Hon. Charles Nagel, the next speaker, was unable to be present on account of the pressure of official business. His place on the program was taken by Dr. James Brown Scott, who read a portion of the report of the Committee on Codification. The address which Mr. Nagel had prepared for delivery follows:]

ADDRESS OF HON. CHAS. NAGEL, SECRETARY OF COMMERCE AND LABOR,

ON

The Codification of International Law

The suggestion for the codification of international law is no doubt to be attributed to a growing desire to promote peace among the nations.